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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 180

RALPH WAGNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUPPORTING BRIEF.

DAVID H. CANNON,
921 Bank of America Building, Los Angeles,
Attorney for Petitioner.

Parker & Baird Company, Law Printers, Los Angeles.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND SUPPORTING BRIEF.

To the Honorable, the Supreme Court of the United States:

Ralph Wagner, the above named petitioner, prays that a writ of certiorari be issued by this court to review a judgment of the Circuit Court of Appeals for the Ninth Circuit, entered on April 8, 1941 [R. 146], affirming a judgment of the United States District Court for the Southern District of California, Central Division, which said judgment by the said Circuit Court of Appeals was amended by order filed May 19, 1941 [R. 151], and in this behalf petitioner respectfully shows:

Opinion of the Court Below.

The opinion of the Court of Appeals was rendered and filed April 8, 1941, and is reported in the record at pages 146 to 150. That opinion was later and under date of May 19, 1941, amended by striking out one sentence in the original opinion and inserting in lieu thereof another sentence. This amendment is set out in the record at page 151. The opinion of the court below has not yet been published in any official report.

Statement of the Case.

1. The Circuit Court of Appeals affirmed the conviction of the petitioner under an indictment in one count charging the petitioner with income tax evasion for the year 1934, and affirmed the sentence imposed against the petitioner of two years' imprisonment and a fine of $2,500. The petitioner was tried before the court sitting without a jury.

The indictment charged that for the calendar year 1934:

> ". . . defendant had, derived and received a gross income of over $5,000, computed in accordance with the Revenue Act of 1934, c. 277, 48 Stat. 680 . . . to-wit: $100,050.83, derived as follows, that is to say:
>
> | | |
> |---|---|
> | Profits from sales of capital assets | $ 88,189.16 |
> | Income received from Mary McDermott | 11,044.29 |
> | Miscellaneous income | 679.88 |
> | Income from business as astrologer | 137.50 |
> | Gross Income | $100,050.83 |

Emphasis ours wherever used.

That for and during the said calendar year the said defendant was entitled to and allowed by the said Revenue Act deductions (other than those deductions taken in computing gross income as aforesaid) in the sum of, to-wit: $9,276.37, and no more, on account of the following:

Taxes paid	$ 126.97
Deductible losses	650.00
Bad debts	556.00
Contributions	235.00
Travel expenses	998.12
Attorney fees	35.00
Auto expenses	1,213.68
Depreciation on automobiles	447.93
Telephone and telegraph	866.28
Salary to E. Wagner	2,420.00
Office expense	49.71
Expense of managing fighter	1,495.46
Miscellaneous business expense	182.22
	$9,276.37"

* * * * * * * *

"That the said defendant, well knowing all of the foregoing facts, did on or about, to-wit: June 15, 1935, at Los Angeles, . . . wilfully, knowingly, unlawfully and feloniously attempt to evade and defeat a large part of said tax, to-wit, $25,105.79, upon his said net income for the said calendar year 1934, and as means of so wilfully, knowingly, unlawfully and feloniously attempting to evade and defeat said tax did . . . make under his oath to said Collector of Internal Revenue an income tax return for said calendar year, stating specifically therein the items of

his *gross income* for said calendar year, to have been the sum of $16,731.43, and no more, derived as follows:

"Promotional and ranching $16,731.43 and *stating specifically the items of deductions* (other than those taken in computing the amount of gross income aforesaid) allowed to him by said Revenue Act for said calendar year *to have been none* and stating therein *no other items of deductions*, and stating his *net income* for said calendar year to have been the sum of $16,731.43, and no more, and showing the total tax due and payable by him for said calendar year to have been the sum of $1,371.70 and no more; and he, the said defendant, did then and there pay to the said Collector the sum of $50.00 and no more, as and for his income tax for said calendar year 1934." [R. 2-5.]

This item of $16,731.43 reported as gross income (and the same amount was reported as net income), came from the partnership return of petitioner Ralph Wagner and his adopted son Ernest Wagner, as shown by the following, taken from the testimony of Internal Revenue Agent Irving Stacy, a prosecution witness. He testified that the

"partnership return (was) filed by Ralph Wagner and Ernest Wagner showing net income of $33,462.86. This was divided equally between Ralph Wagner and Ernest Wagner, and was transferred to their individual returns, Ralph Wagner reporting $16,731.43, and Ernest Wagner reporting a like amount. Of course the Bureau of Internal Revenue has denied partnership." [R. 70.]

2. The Circuit Court of Appeals held:

> "There is much in the record tending to prove deliberate fabrication of evidence in building up the taxpayer's indebtedness. [Op. Court of Appeals, R. 150.]

Petitioner was charged under an indictment that descended to particulars; he was put on trial under those particular averments in the indictment; the prosecution, in the midst of the trial, abandoned those particulars alleged and proceeded on an entirely different theory and convicted the petitioner of something different from that charged in the indictment.

The evidence produced by the prosecution disclosed that the indictment was returned, and the trial proceeded, upon the theory that the petitioner, for the purpose of evading the payment of income taxes, fabricated the idea of a partnership between the petitioner and his adopted son, Ernest Wagner; that such partnership had no basis in law or fact and the idea of a partnership was made up out of the whole cloth merely for the purpose of evading the tax.

During the progress of the trial, the court was examining a prosecution witness, Harlan Moore, who had prepared the return in question. The following occurred:

> "The Court: . . . the Government contends that there was no partnership, and that the idea of a partnership arose in the mind of the defendant with the idea of defrauding the Government." [R. 28.]

At the conclusion of the trial, and after discussing at length the elements of a partnership from the standpoint of civil liability, the trial court stated:

> " 'Now I am not going to analyze the facts other than to say that there are certain uncontradicted facts here which, to my mind, lead me to the conclusion that the relationship between the parties here, . . . while not establishing a partnership in law, are sufficient to raise doubt as to whether there was a fraudulent intent on the part of the defendant here in conveying to the accountant that a partnership existed.' " [Rep. Tr. 497.]

The gross income and the allowable deductions set out in the indictment and last referred to came from the "reconstructed return" prepared by the prosecution witness, Irving Stacy. [See abstract of his testimony, R. 70.] This witness testified:

> " 'I am an internal revenue agent. I have reconstructed what the Bureau of Internal Revenue considers to be a proper tax return of Ralph Wagner for the calendar year 1934. There are three returns involved in this action. One is a partnership return filed by Ralph Wagner and Ernest Wagner showing net income of $33,462.86. This was divided equally between Ralph Wagner and Ernest Wagner, and was transferred to their individual returns, Ralph Wagner reporting $16,731.43, and Ernest Wagner reporting a like amount. Of course the Bureau of Internal Revenue has denied partnership. . . ."

As heretofore stated, the $16,731.43 set up in the indictment [R. 70] as being the returned gross income—and also the returned net income, because no items of deductions were taken from that item by the petitioner—was reached by dividing between Ralph Wagner and Ernest Wagner the "net income of $33,462.86" shown on the partnership return.

3. The Circuit Court of Appeals denied petitioner's "Motion for a New Trial or to Remand," made in the Circuit Court and which motion was based on the ground of newly-discovered evidence and was submitted to the Court of Appeals coincident with the submission of the appeal. [Op. Court of Appeals, R. 146.]

This motion was supported by affidavits of Ralph Wagner, Kimo E. Ward, Leo Ellis Wagner, Thomas Hunter, Edith Hull, Frank E. Wellens, Theresa Pettinger and Luis A. Trias [R. 118], and was made under Rule II (3) of Rules of Practice and Procedure, after plea of guilty, etc., in Criminal Cases promulgated by this court and which rule provides:

> "A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment."

The Circuit Court stated that it had reviewed the affidavits and found "them to consist largely of hearsay statements and of impeachment of testimony received in the trial," and that the Circuit Court did not "regard them as meeting the requirements, and particularly requirement (e) of Johnson v. United States, 32 Fed. (2d) 127" [Op. Court of Appeals, R. 146], wherein, according to the opinion of the Ninth Circuit Court of Appeals, it is held that the newly discovered evidence disclosed by the affidavits must be shown in the affidavits themselves to be

> ". . . of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal."

4. The Circuit Court of Appeals denied the motion of petitioner to remand the cause to the trial court to the end that the motion for a new trial might be ruled, stating in its opinion in the first instance:

> "We have no power to entertain a motion for a new trial, hence we consider only whether or not we should use our discretion to remand." [R. 147.]

It later modified that sentence by stating:

> "We have no power to entertain a motion for a new trial, hence we consider only whether, in the exercise of our discretion, we should remand the case." [R. 152.]

The Questions Presented.

I.

The Circuit Court of Appeals held:

a. That the petitioner did have the benefit of a fair trial; that petitioner's contention to the effect that the failure of the prosecution to establish its major premise, viz., that the idea of a partnership was created in the mind of the then defendant as a vehicle for the fraud, and for that reason petitioner was convicted on a charge different from that set up in the indictment, is "without merit and . . . too flimsy to justify further comment." [Op. Court of Appeals, R. 150.]

1. The question thus arises whether or not a defendant is justly convicted where the charge (a) is not set out in the words of the statute with only such recital of details as is sufficient to put the defendant on notice of the charge against him, and so as to enable him to prepare his defense and to plead his acquittal or conviction as a bar to another prosecution for the same offense, but (b) descends to particulars, charging details of the fraud, which details are not proven beyond reasonable doubt, or are abandoned by the prosecution in the midst of the trial.

The question is new and is not covered by any of the decisions of this court, but should be settled by this court, particularly inasmuch as it involves a question of general law as to the rights of an accused who is charged with income tax evasion by the use of specific means and in specific amounts to be tried on *those* charges and not upon *other* charges of fraud arising during the trial through the abandonment by the prosecution of its major premise; in this instance, the "false partnership" theory.

II.

The Circuit Court of Appeals held:

a. That it had no power to entertain a motion for a new trial; that the motion to remand the case to the trial court, to the end that the motion for a new trial may there be ruled, ought not to be granted unless in the opinion of the Circuit Court the affidavits submitted in support of such motion for a new trial be of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.

b. In effect, that, under the Rules of Practice and Procedure, after plea of guilty, etc., in Criminal Cases, promulgated by this court on May 7, 1934, pursuant to the Act of Congress approved March 8, 1934, the Circuit Court has the discretionary right to remand, or to refuse to remand, the cause to the trial court to the end that the motion for a new trial may be ruled.

c. In effect, that, under the said Rules of Practice and Procedure, etc., a defendant who appeals from the judgment of a trial court, "within five (5) days after the entry of judgment of conviction," as prescribed in said Rules (Rule III), loses the right which, had he not appealed, he would have had to move the trial court "for a new trial solely upon the ground of newly discovered evidence . . . made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered," as prescribed by said Rules. [Rule II (3).]

1. The question thus arises whether the Circuit Court of Appeals which, according to the opinion of that court, has "no power to entertain a motion for a new trial" [R. 147], can properly consider and determine the probable effect, before the trial court, of the newly discovered evidence, as that evidence is set out in the affidavits filed in support of the motion for a new trial or to remand, if such new trial is granted.

2. The question also arises as to whether or not, under the Rules of Practice and Procedure, after plea of guilty, etc., in Criminal Cases, promulgated by this court on May 7, 1934, pursuant to the Act of Congress approved March 8, 1934, the Circuit Court has any discretionary right to refuse to an appealing defendant the right to have the trial court rule on his motion for a new trial based solely upon newly-discovered evidence, when such right to have such trial court rule upon a motion for a new trial based "solely upon the ground of newly-discovered evidence" is clearly available to a defendant who does *not* appeal.

Both of these questions are new and are not covered by any decisions of this court; both of them ought to be decided by this court because they are important questions of Federal Law and Rules of Practice and Procedure, particularly as those Rules of Practice and Procedure have lately been promulgated by this court and affect the substantive rights of persons accused of crime.

REASONS FOR GRANTING THE WRIT.

I.

The Circuit Court of Appeals Has Decided a Question of Substance Not Heretofore Determined by This Court, and Decided It in a Way Probably Not in Accord With Applicable Decisions of This Court; Such Circuit Court of Appeals Has Decided an Important Question of General Law in a Way Probably Untenable and Has so Far Sanctioned a Departure by the Lower Court From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The holdings of the Circuit Court of Appeals set forth above under the caption "The Questions Presented," subdivision I-a (which in the interest of brevity are not repeated here), present questions which this court has never yet passed upon and which, obviously, should be passed upon by this court. The questions thus presented have directly to do with the rights as secured to a defendant in a criminal case under the Fifth Amendment to the Constitution of the United States, providing that:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

and also under the Sixth Amendment to the Constitution, providing that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

Even where the offense is purely statutory, as in this instance, and has no relation to the common law, and that definition of the offense includes generic terms, it is not sufficient for the indictment to charge the offense in the same generic terms as in the definition; the indictment must descend to particulars so as to inform the accused of the nature of the charge against him to the end that he may properly prepare his defense. Those particulars are matters of substance and not merely of form. See:

United States v. Cruikshank, 92 U. S. 542;

United States v. Hess, 124 U. S. 483;

Stokes v. United States, 157 U. S. 187.

II.

The Circuit Court of Appeals Has Decided an Important Question of General Law in a Way Probably Untenable, and Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court; and Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings, as to Call for an Exercise of This Court's Power of Supervision.

1. The holdings of the Circuit Court of Appeals set forth above under the caption "The Questions Presented," subdivisions II-a and II-b (which in the interest of brevity are not repeated here), are apparently in conflict with the weight of authority and the applicable decisions of other Circuit Courts of Appeals and of this court in holding that the Circuit Court of Appeals and not the trial court should decide on the sufficiency of the affidavits and the probable effect on a new trial of the evidence set out in the affidavits appended to the motion for a new trial.

The refusal of the Circuit Court to remand the case to the trial court for a ruling on the motion for a new trial, in effect, substitutes the discretion of the Circuit Court for the discretion that should repose in the trial court.

2. The holding of the Circuit Court of Appeals set out above under the caption, "The Questions Presented," subdivision II-c (which in the interest of brevity is not repeated here), is probably untenable and such holding involves an important question of federal law which has not been, but should be, settled by this court, and such holdings have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Petitioner respectfully represents that accompanying this petition, and as an exhibit thereto, is a certified copy of the transcript of the entire record in the case, including the proceedings in the Circuit Court of Appeals for the Ninth Circuit.

Wherefore, it is respectfully submitted that this petition be granted.

DAVID H. CANNON,
Attorney for Petitioner.

Certificate of Verification.

State of California, County of Los Angeles—ss.

David H. Cannon, being first duly sworn, deposes and says: That he is counsel for Ralph Wagner, petitioner in the within and foregoing action; that he prepared the within petition and that the matters therein are true as he verily believes, and that the same is not interposed for the purpose of delay.

DAVID H. CANNON,
Counsel.

Subscribed and sworn to before me this 12th day of June, 1941.

(Seal) THERESA FITZGIBBON,
Notary Public in and for Said County and State.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. .....

RALPH WAGNER,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals is printed in the record at pages 146 to 150.

Jurisdiction.

The judgment of the Circuit Court of Appeals was rendered on April 8, 1941, and amended on May 19, 1941. This court has jurisdiction under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925.

Statement.

A full statement appears in the petition and in the interest of brevity is not repeated here.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding that the petitioner had the benefit of a fair trial, and in holding that a failure of the prosecution to establish its major premise upon which the charge was based, viz., that the partnership theory was resorted to by the petitioner as a vehicle for the fraud, did not justify the reversal of the judgment and sentence imposed upon the petitioner by the trial court.

2. The Circuit Court of Appeals erred in holding that where there is presented to the Circuit Court, in a Criminal Case, a Motion for a New Trial or to Remand, "solely upon the ground of newly-discovered evidence," as provided by the Rules of Practice and Procedure, etc., in Criminal Cases, the Circuit Court has the *discretionary* right to remand or to refuse to remand the case to the trial court to the end that the motion for new trial may be ruled.

3. The Circuit Court of Appeals erred in denying to petitioner, who had appealed from the judgment of the trial court, "within five (5) days after the entry of judgment of conviction," the right to move for a new trial and have that motion ruled by the trial court.

4. The Circuit Court of Appeals erred in holding that the Circuit Court and not the trial court should decide on the sufficiency of the affidavits and the probable effect on a new trial of the evidence set out in the affidavits appended to the motion for a new trial.

ARGUMENT.

I.

The Petitioner Did Not Have a Fair Trial Because of the Failure of the Prosecution to Establish Its Major Premise That the Petitioner Had Fabricated the Partnership Idea for the Purpose of Evading the Payment of Income Tax.

Specification of Error No. 1 will be discussed hereunder.

Citation of authorities other than those set out on page 13 of the foregoing petition are unnecessary to support this contention. Argument of a more persuasive character than that set out in the opinions in those cited cases could not be made and we therefore submit the matter on those authorities.

The opinion of the Circuit Court concludes as follows:

> "The 'reasons' (advanced on petitioner's appeal to the Circuit Court for a reversal of the judgment) given are wholly without merit and are too flimsy to justify further comment. There is much in the record tending to prove deliberate fabrication of evidence in building up the taxpayer's indebtedness." [R. 150.]

Such a conclusion is not justified. Even if there had been "deliberate fabrication of evidence in building up the taxpayer's indebtedness," as stated in the opinion of the Circuit Court [R. 150], it does not follow that the charge in the indictment is sustained. The indictment, itself, declares that in the return filed by the petitioner the petitioner stated "specifically the items of deductions . . . allowed to him by said Revenue Act for said calendar year to have been *none*," and stated in said return that there were "no other items of deductions." [R. 5.]

The defendant in the trial court, the petitioner here, specifically declared in the income tax return that he claimed no deductions from the amount set up on his return as being his gross income. For that reason any "deliberate fabrication of evidence in building up the taxpayer's indebtedness" would not justify the conviction here.

II.

The Circuit Court Had No Discretionary Right to Remand or to Refuse to Remand the Case to the Trial Court, to the End That the Motion for a New Trial Might Be Ruled; Petitioner Was Entitled as a Matter of Right to Have the Trial Court Rule on the Motion for a New Trial.

Specifications of Errors Nos. 2 and 3 will be discussed hereunder.

The following rules from Rules of Practice and Procedure, after plea of guilty, etc., in Criminal Cases, promulgated by this court on May 7, 1934, are important in this discussion:

> "II. Motions.
>
> * * * * * * * *
>
> "(3) A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment.
>
> * * * * * * * *

"III. Appeals. An appeal shall be taken within five (5) days after entry of judgment of conviction, . . .

* * * * * * * *

"Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. . . .

"IV. Control by Appellate Court. The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, . . .

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, . . ."

As soon as the notice of appeal was filed with the clerk of the trial court and such notice was by him filed with the clerk of the appellate court, the appellate court obtained the right to supervise and control the proceedings, and the trial court lost jurisdiction, except for the purpose of perfecting the record in aid of the appellate court's jurisdiction.

Obviously, under the rules, a defendant who has not appealed and who moves for a new trial solely upon the ground of newly discovered evidence before the trial court, within the sixty-day period after final judgment, has the absolute right to compel the trial court to consider and rule upon that motion.

The rules, however, as they have been interpreted by the Circuit Court in this action, seem to discriminate

against a defendant who has appealed by leaving it to the *discretion* of the Circuit Court as to whether or not the trial court may consider and rule upon a motion for a new trial.

Inasmuch as it is a *right* of persons convicted of crime who do *not* appeal from the judgment, to use newly-discovered evidence to effect a new trial, it certainly ought to be, and we think is, a *right* of persons convicted of crime who *do* appeal, to use newly-discovered evidence as a basis for obtaining a new trial.

To illustrate: A man may be convicted and prosecute no appeal. Within sixty (60) days after judgment he moves for a new trial upon newly discovered evidence, which evidence we shall assume is most clear and convincing of his innocence. The trial court would be compelled to hear and rule upon that motion for a new trial.

If that same man, under the same circumstances had appealed, the trial court would immediately lose jurisdiction, except to assist in completing the record on appeal and, under the decision of the Circuit Court, that court could use its own "discretion" to remand the case or not, and the exercise of discretion against remanding the case to the lower court would be an effective denial of the motion for a new trial.

"That a new trial should ordinarily be granted because of newly-discovered evidence," is elementary, declared the Eighth Circuit Court of Appeals in *Johnson v. United States,* 32 Fed. (2d) 127.

If an appellate court affirms a judgment it becomes final unless an appeal is taken. If a non-appealing defendant has a right to move for a new trial within sixty (60) days after the lower court's judgment becomes final, certainly

an appealing defendant should have that same right after the case is back in the District Court from the affirming opinion of the appellate court. The decision of the Circuit Court in this case cuts off that right, and in so doing penalizes the appealing defendant.

III.

The Circuit Court Erred in Holding That It and Not the Trial Court Should Decide the Sufficiency of the Affidavits Supporting the Motion for a New Trial and Should Decide the Probable Effect on a New Trial of the Evidence Set Out in Those Affidavits.

Specification of Error No. 4 will be discussed hereunder.

Affidavits in support of a motion for a new trial on the grounds of newly-discovered evidence have a fourfold purpose; (1) to show the nature of the evidence newly discovered, (2) to show whether or not due diligence was used in discovering the evidence, (3) to enable the *trial* court, who first heard and observed the witnesses, to say whether or not the newly-discovered evidence might have shaken the credibility of those witnesses and might have affected the decision of the trial court in the first instance, and (4) to enable the *trial* court to say how the newly-discovered evidence would probably affect the result of a new trial.

It is difficult to understand how the Circuit Court could say, from an examination of the affidavits submitted in

support of the motion for a new trial, that such evidence would or would not "probably produce an acquittal." To sustain such conclusion by the Circuit Court would be to permit the Circuit Court to determine how the trial court would exercise its discretion in ruling upon the motion for a new trial.

The ruling of a trial court on a motion for a new trial is discretionary. The discretion of the trial court is never overridden by the appellate court unless there be a clear abuse of discretion on the part of the trial court.

In ruling upon the motion for a new trial or to remand, the appellate court need only determine whether or not the matters set out in the affidavits in support of the motion justify the appellate court in remanding the case to the trial court. If the case is remanded it is then up to the trial court to determine from the affidavits that may have been filed up to that moment whether or not a new trial should be granted.

The fact that the rule itself provides for the remanding of a case to the trial court for ruling on the motion for a new trial clearly demonstrates that it was never the intention that the appellate court should rule on that motion, or on the sufficiency of the affidavits or their probable effect on a new trial. If it were intended that the appellate court should rule on the sufficiency of the affidavits and their probable effect on a new trial there would be no necessity of remanding any case to the lower court for such ruling.

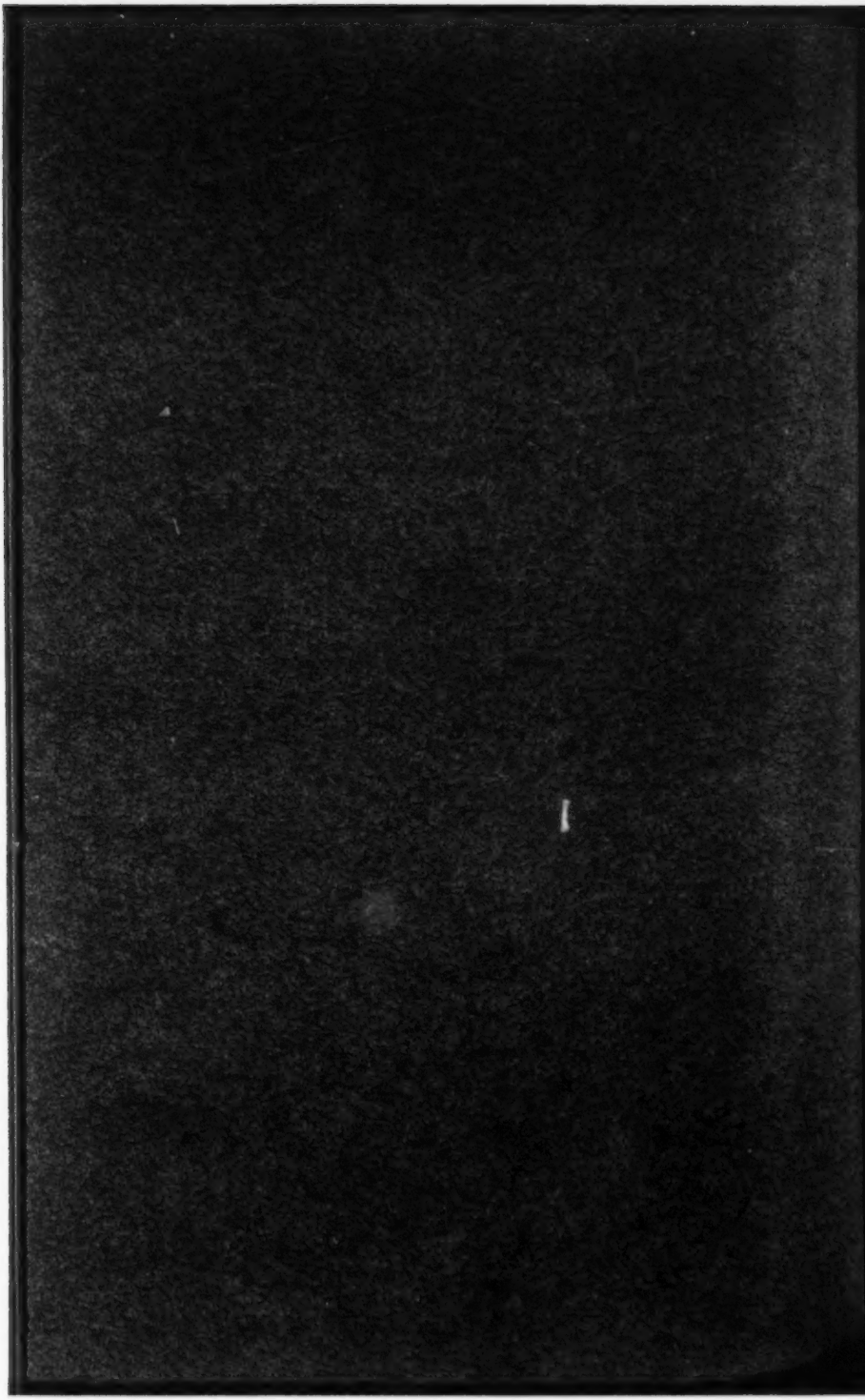
Conclusion.

Petitioner now stands convicted and sentenced to serve a penitentiary term of two years and to pay a fine of $2,500. He was convicted of an offense not charged in the indictment and, under the decision of the Circuit Court and because of his appeal from the judgment of conviction, was denied that right to move for a new trial and to have that motion ruled by the trial court, a right which is accorded under the law and court rules to defendants who do not appeal in criminal cases.

The Writ of Certiorari should issue.

Respectfully submitted,

DAVID H. CANNON,
Attorney for Petitioner.



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Slappey v. *United States*, 110 F. (2d) 528 — 11

Tinkoff v. *United States*, 86 F. (2d) 868, certiorari denied, 301 U. S. 689 — 11

Toledo Co. v. *Computing Co.*, 261 U. S. 399 — 11

United States v. *Miro*, 60 F. (2d) 58 — 9

Statute:

Revenue Act of 1934, c. 277, 48 Stat. 680, 724:
Section 145 (U. S. C., Title 26, Sec. 145) — 2, 9

Miscellaneous:

Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases, promulgated by the Supreme Court May 7, 1934: Rule 11 — 3

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 180

RALPH WAGNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. Its statement made at the conclusion of the trial appears on pages 134–144 of the record. The opinion of the Circuit Court of Appeals (R. 146–150) is reported at 118 F. (2d) 801.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 8, 1941 (R. 150–151). A petition for rehearing was filed May 6, 1941, and denied on May 19, 1941 (R. 151–152).

The petition for a writ of certiorari was filed June 17, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 14, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The petitioner was convicted of wilfully attempting to evade and defeat his individual income tax for the year 1934. The questions presented are:

1. Whether the petitioner received a fair trial because the conviction was not based upon the "major premise" of the prosecution's case.

2. Whether the circuit court of appeals correctly refused to remand the case to the district court for a new trial, or for consideration of a motion for a new trial, upon the grounds of newly discovered evidence.

STATUTE AND COURT RULE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680, 724:

SEC. 145. PENALTIES.

* * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment

thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution (U. S. C., Title 26, Sec. 145).

Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases, promulgated by the Supreme Court May 7, 1934:

Rule II. *Motions.* (1) Motions after verdict or finding of guilt, or to withdraw a plea of guilty, shall be determined promptly.

(2) Save as provided in subdivision (3) of this Rule, motions in arrest of judgment, or for a new trial, shall be made within three (3) days after verdict or finding of guilt.

(3) A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after final judgment, without regard to the expiration of the term at which judgment was rendered, unless an appeal has been taken and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment.

* * * * *

STATEMENT

The petitioner, Ralph Wagner, during the calendar year 1934 was a rancher at Saugus, Califor-

nia (R. 17, 67–68, 80). On September 13, 1939, he was indicted in the United States District Court for the Southern District of California on charges of wilful attempts to evade and defeat $25,105.79 of an income tax of $26,477.49 due from him for the calendar year 1934 (R. 1–5). The indictment charges that petitioner had a gross income of $100,050.83 during the calendar year 1934 and enumerated specific deductions to which petitioner was entitled, aggregating "$9,276.37, and no more" (R. 2–3); leaving a net income of $90,774.46 (R. 4). It alleges that petitioner, knowing these facts, in his income tax return filed on or about June 15, 1935, willfully reported a gross income of only $16,731.43, with no deductions; in consequence, petitioner's return showed a tax due of only $1,371.70 when in fact he owed a tax of $26,477.49 (R. 4–5). On October 9, 1939, the petitioner pleaded not guilty and waived a jury trial (R. 6).

A partnership return of income for petitioner and Ernest Wagner, and an individual income tax return for the petitioner, were filed on June 15, 1935, for the year 1934 (Exs. 6 and 7, R. 15–16). The partnership return reported net income of $33,462.86 (R. 70), after taking deductions, *inter alia,* of $13,271 for bad debts, and $2,833.80 for depreciation of livestock (R. 72, 73). One-half of such net income, or $16,731.43, was transferred to the individual return of the petitioner (R. 70), and total income taxes of $200 were paid by him in four $50 payments during the year 1935 (R. 16).

The Government presented evidence, which was controverted, indicating that the claim made by the petitioner that a partnership existed between him and his adopted son, Ernest Wagner, was false and that the entire income of the alleged partnership was, in fact, the income of the petitioner (R. 36, 88, 90, 105–106). There was, however, evidence indicating that they considered themselves to be partners (R. 27, 29, 76, 85, 87). The District Court concluded that while the facts did not establish a partnership in law, they were sufficient to raise a doubt whether there was fraudulent intent in claiming that a partnership existed (R. 140).

In addition to the partnership issue, however, the Government proved by uncontroverted evidence that the petitioner had prepared false records in order to take false deductions for bad debts and had taken false depreciation on the cost of livestock. Thus, in order to claim a bad debt deduction, a note from Charles Wagner for $1,765.25, which admittedly was not due, was made on May 20, 1935, but arbitrarily dated May 8, 1930, because the petitioner was in "a little trouble in regard to his tax" (R. 52–53, 58, 63). The petitioner then "aged" the note by carrying it between his sock and the insole of his shoe (R. 59). Another note of Theresa Pettinger, mother of Ernest Wagner, which was claimed as a bad debt (R. 77), was dated back and discolored (R. 82). Deductions also were claimed in the partnership return for depreciation, in the

amount of $2,833.80, based upon the cost and useful life of certain valuable horses owned by the petitioner (R. 22, 24–25, 72). However, the cost figures for various horses, which were based on information furnished by the petitioner (R. 18), were greatly in excess of the actual cost.[1]

An internal revenue agent concluded that the petitioner had received total net income of $91,695.25, on which the tax was $26,477.49 (R. 74). Even if the alleged partnership did exist, the correct tax due from the petitioner therefore was greatly in excess of that reported (R. 16). The petitioner did not testify at the trial, but did call two other witnesses (R. 75–103).

The District Court, finding "deliberate and palpable fraud", found the petitioner guilty as charged in the indictment (R. 134–144), and on February 5, 1940, a sentence of two years in a penitentiary and a fine of $2,500 was imposed (R. 7–8).

On February 6, 1940, the petitioner appealed upon grounds, *inter alia,* that the verdict was con-

[1] The petitioner's falsifications may be tabulated as follows:

Horse	Stated cost	Actual cost
Bert Abbe	$3,500	$550 (R. 42, 72)
Evening Sun	3,500	800 (R. 26, 48)
Jean Morris	3,500	800 (R. 26, 48)
Vide McKinney	500	175 (R. 26, 41)
Calumet Dotty	500	225 (R. 25, 42)
Valencia Dona	500	400 (R. 26, 46)
Annabelle Watts	500	300 (R. 26, 47)

trary to and unsupported by the evidence, and that the District Court erred in denying a motion for a new trial (R. 8–10).

On February 14, 1941, the petitioner filed a motion in the Circuit Court of Appeals for a new trial, or to remand the case to the trial court for a new trial, on the ground of newly discovered evidence (R. 117). This was supported by seven affidavits: (1) Two affidavits dated January 6, 1941, and one dated September 21, 1940, stated that Charles Wagner had told the affiants that he owed petitioner money (R. 118–120, 120–121, 123–125). (2) An affidavit from Theresa Pettinger stated that her note was genuine (R. 127–128). (3) Two affidavits, dated December 30 and October 17, 1940, stated that McPherson, who testified at the trial that he had sold petitioner for $550 the horse which petitioner entered as costing $3,500 (R. 42, 72), had told the respective affiants that the horse in fact cost petitioner $3,500 and that his testimony was incorrect (R. 121–123, 125–126). (4) An affidavit, dated April 26, 1940, stated that one Axcley, who testified against petitioner (R. 56–65), had stated to affiant that he would send petitioner to prison by fair means or foul (R. 128–129).

The petitioner's motion for a new trial, filed in the Circuit Court of Appeals, was submitted and considered in connection with the appeal (R. 145–147). On April 8, 1941, the Circuit Court of Appeals affirmed the judgment of the District Court

(R. 146–151). A petition for rehearing was filed on May 6, 1941, and denied on May 19, 1941 (R. 151–152).

ARGUMENT

I

The petitioner contends that he did not have a fair trial because the government failed to prove fraudulent use of a partnership device (Pet. 5–6, 9, 12–13, 19–20). The argument seems to be that his conviction, based upon fraudulent deductions for bad debts and depreciation (R. 136, 142–144), is invalid because it is not responsive to the major premise of the prosecution, that petitioner fraudulently claimed the existence of a partnership. Petitioner does not urge that there is any want of evidence to support the conviction for fraudulent deductions. His contention is either (a) that there is a fatal variance between the indictment and the proof (see Pet. 5, 9, 12–13) or (b) that the indictment specifically exculpated him from any offense relating to fraudulent deductions (see Pet. 19–20). The contention, in either view, is without merit.

(a) The indictment does not set out the fictitious partnership as the gravamen of petitioner's guilt. It specifies the receipt of a gross income of over $100,000 and enumerates specific deductions of something over $9,000; it charges that petitioner was entitled to these deductions "and no more" (R. 2–3). Proof that petitioner had fraudulently

taken other deductions in the partnership return, which were reflected in the individual return, is within the offense charged by the indictment.[2]

That offense, moreover, is the wilful attempt to evade income taxes, under both the indictment (R. 4) and the statute. Section 145 (b), *supra; United States* v. *Miro,* 60 F. (2d) 58, 60–61 (C. C. A. 2d). Petitioner is not saved from conviction simply because the Government did not prove every example of wilful tax evasion as to which it introduced evidence.

(b) The indictment does not exculpate petitioner of making false deductions. It states simply that on petitioner's *individual* return he claimed no deductons (R. 5). But the false deductions made on the partnership return (R. 20–21, 23, 24, 25) served automatically to reduce the tax due on petitioner's individual return, which reported as his sole income one-half of the partnership income (R. 70). The wilful evasion of taxes is the same whether the false deductions be made in the partnership or the individual return, and the indictment's particularization of the only allowable deductions (R. 4) made it impossible for petitioner to be in doubt that his false deductions were challenged.

---

[2] Petitioner, neither in the trial court nor the appellate courts, has attacked the indictment as too general; nor did he demand a bill of particulars. His objection, therefore, is simply one of variance.

(c) Petitioner did not raise his objection in the trial court and did not assign error on this ground (R. 9–11). They were argued as "plain error" in the court below and were correctly rejected as "wholly without merit" (R. 149–150).

II

THE COURT BELOW CORRECTLY DENIED THE PETITIONER'S MOTION TO REMAND THE CASE TO THE DISTRICT COURT FOR A NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE

The judgment of conviction was entered on February 5, 1940 (R. 7–8), and appeal taken on February 6, 1940 (R. 8–10). The sixth ground of the appeal was that the District Court erred in denying the petitioner's motion for a new trial (R. 10). However, that motion was on the grounds that the judgment was contrary to the evidence and the evidence insufficient in support thereof, and that the District Court erred in receiving certain testimony. The motion was denied on February 5, 1940 (R. 132–133). The present motion for a new trial was filed for the first time in the Circuit Court of Appeals more than a year later, on February 14, 1941 (R. 117). Its denial plainly was not reversible error.

(a) Petitioner has wholly failed to exercise the diligence required to secure a new trial on the ground of newly discovered evidence.[3] The sup-

[3] See *Camp* v. *United States*, 16 F. (2d) 370 (C. C. A. 6th), certiorari denied, 274 U. S. 754; *Perry* v. *United*

porting affidavits show that most of the information was brought to the attention of petitioner or his attorneys considerably before the motion was filed on February 14, 1941.[4]

(b) All of the affidavits except one (R. 127–128) consist solely of impeaching evidence of a hearsay nature. The conclusion of the court below that they were insufficient to warrant a new trial is clearly correct. *Johnson* v. *United States,* 32 F. (2d) 127 (C. C. A. 8th); *Isgrig* v. *United States,* 109 F. (2d) 131 (C. C. A. 4th). *Slappey* v. *United States,* 110 F. (2d) 528 (C. C. A. 5th); *Casey* v. *United States,* 20 F. (2d) 752 (C. C. A. 9th), affirmed on other grounds, 276 U. S. 413.

(c) Finally, under Rule II (3) of the Criminal Rules, *supra,* the question of remanding the case to the District Court for a new trial was discretionary with the court below. Cf. *Mattox* v. *United States,* 146 U. S. 140; *Toledo Co.* v. *Computing Co.,* 261 U. S. 399, 421. There was no abuse of such discretion. See *Fairmount Glass Works* v. *Coal Co.,* 287 U. S. 474, 485.

States, 39 F. (2d) 52, 54 (C. C. A. 5th), certiorari denied *sub nom. Capo* v. *United States*, 281 U. S. 769; *Tinkoff* v. *United States*, 86 F. (2d) 868 (C. C. A. 7th), certiorari denied, 301 U. S. 689.

[4] Five of the seven affidavits deal with information so made known between February 20 and July 27, 1940 (R. 126, 125, 129, 123, 121). A sixth was made known "after the trial" (R. 119), and the seventh does not state when petitioner or his attorneys knew of the information (R. 127–128).

CONCLUSION

The decision below is correct. There is presented neither an important question nor a conflict of decisions. It is therefore respectfully submitted that the petition should be denied.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
WARNER W. GARDNER,
GORDON B. TWEEDY,
EARL C. CROUTER,
Special Assistants to the Attorney General.

JULY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

(19)

The Supreme Court

OF THE

United States

October Term, 1941

No. 180

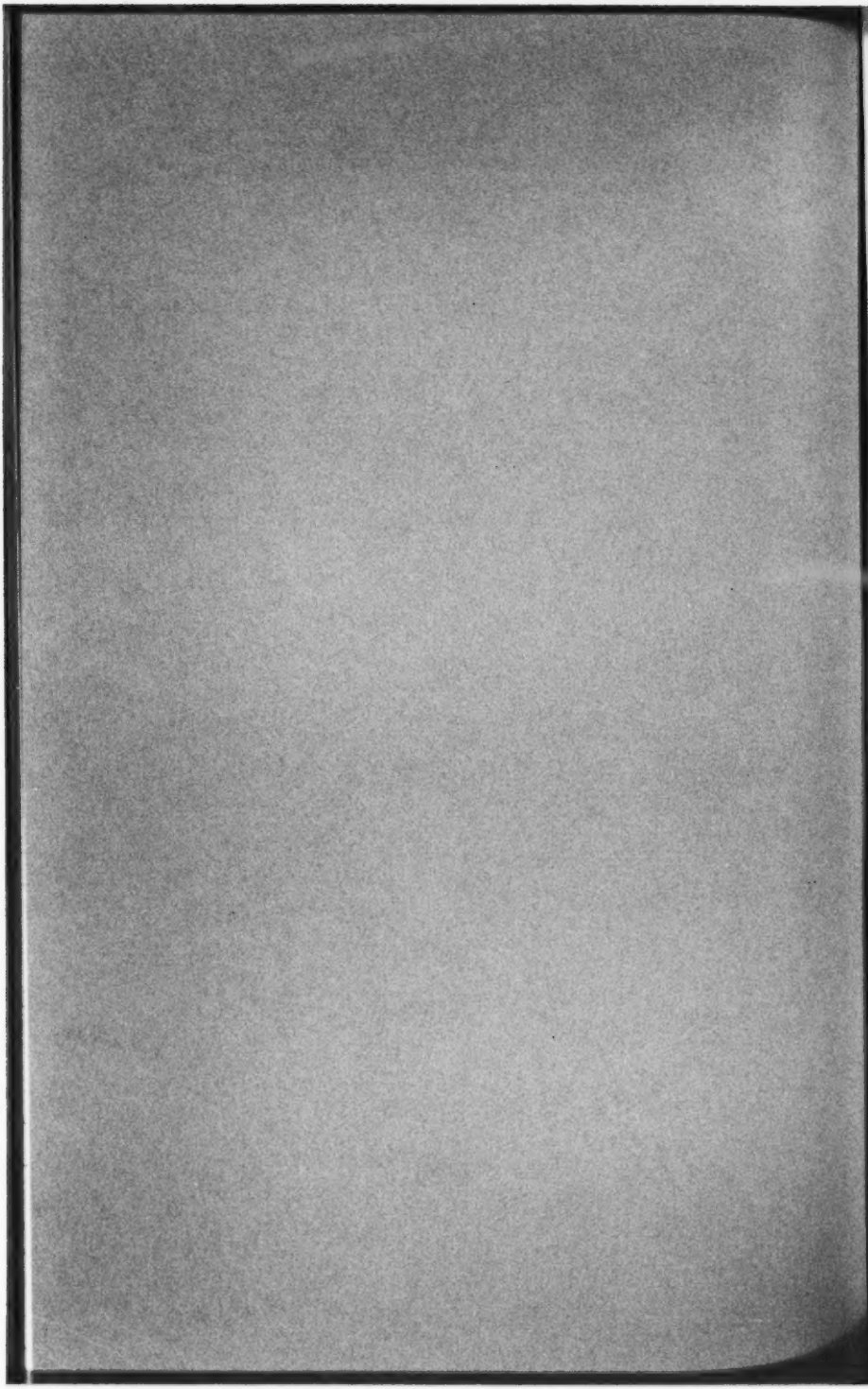
RALPH WAGNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME AND PETITION FOR REHEARING

RALPH W. WAGNER,
Rancho Chihuahua,
Route 1, Box 229A,
Saugus, California,
Petitioner, Pro Per.



The Supreme Court

OF THE

United States

October Term, 1941

No. 180

RALPH WAGNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

To the Honorable, The Supreme Court of the United States:

Comes now Ralph Wagner, petitioner herein, and moves this Honorable Court for an order granting a rehearing of his Petition for Writ of Certiorari, which was heretofore denied on October 13, 1941, on the following grounds:

1. That petitioner's Petition for Writ of Certiorari brought before this Honorable Court for its first determination the judicial construction applicable to the promulgated Rules of Practice and Procedure on May 7, 1934, in criminal cases, set forth in Rule II 2 (3), pursuant to an Act of Congress approved March 8, 1934.

2. That in addition to affidavits of newly discovered material evidence contained in Transcript of Record, on file herein, petitioner submits in his Petition for Rehearing additional affidavits of newly discovered material evidence, which he submits substantially supports his right to a new trial.

3. The following letters from the Honorable Clerk of the Supreme Court:

OFFICE OF THE CLERK,
SUPREME COURT OF THE
UNITED STATES,
WASHINGTON, D. C.

November 8, 1941.

Mr. Ralph W. Wagner,
Rancho Chihuahua, Route 1, Box 229 A,
Saugus, California.

Dear Sir:

Your letter addressed to the President was by him referred to the Department of Justice and has, in turn, been directed to this Office.

Your attorney was advised by wire on October 13th of the denial of the petition for certiorari in the case of Wagner v. The United States of America, No. 180, October Term, 1941.

Your telegram to the President arrived too late to be considered as an application for an extension of time within which to file such petition for rehearing, the time having expired on November 7th.

Under these circumstances, however, I would suggest that should you desire to file a petition for rehearing you forward 40 printed copies thereof, prefaced by a motion for leave to file out of time. Your petition for rehearing will then receive the same consideration as though it had been timely filed.

Yours truly,
CHARLES ELMORE CROPLEY, Clerk,
By E. P. Cullinan (Signed)
E. P. Cullinan
Assistant.

EPC:c

OFFICE OF THE CLERK,
SUPREME COURT OF THE
UNITED STATES,

AIR MAIL Washington, D. C.
November 10, 1941.

Mr. Ralph W. Wagner,
Rancho Chihuahua, Route 1, Box 229 A,
Saugus, California.

Dear Sir:

Late Saturday, November 8th, Mr. Chief Justice Stone handed me your telegram sent to him with reference to an extension of time within which to file petition for rehearing in the case of Wagner vs. United States, No. 180, October Term, 1941.

Earlier on that day I had written you in response to a telegram which you sent to the President and which eventually reached this office. The Chief Justice directs me to confirm the suggestions outlined in that letter.

This letter is being sent air mail and it is possible it may reach you prior to my letter of November 8th which was sent by regular mail.

Yours truly,
CHARLES ELMORE CROPLEY, Clerk
By (Signed) H. B. Willey
Deputy

HBW:EG

Dated November 27, 1941

RALPH W. WAGNER
Ralph Wagner, appearing in his own behalf.

The Supreme Court

OF THE

United States

October Term, 1941

No. 180

RALPH WAGNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

To the Honorable, The Supreme Court of the United States:

This is a petition for rehearing of a Petition that a Writ of Certiorari be issued to review a judgment of the Circuit Court of Appeals for the Ninth Circuit, entered April 8, 1941, affirming a judgment of the United States District Court for the Southern District of California, Central Division, sitting as the trier of the facts, whereby Petitioner was adjudged guilty un-

der an indictment charging income tax evasion, and was sentenced to a term of imprisonment of two years and to pay a fine of $2500.00.

The opinion of the judgment, affirming the judgment of the District Court is printed in the Transcript of Record, page 146. Pointing specifically to that part of the Opinion headed "A Motion for New Trial or to Remand," and incorporated herein by reference, it is submitted, that the decision interpreting and construing Rule 2 (3) Criminal Practice and Procedure is in error; that this Honorable Court has never passed upon the final construction of said Rule and that the error contained in the opinion of the Circuit Court should not stand as a precedent, either in regard to the claimed denial of justice to Petitioner, or for subsequent reliance by United States Courts upon the erroneous precedent established in Petitioner's case.

POINT ONE

The Circuit Court of Appeals erred:

1. In holding that where there is presented to the Circuit Court, in a Criminal Case, a Motion for a New Trial or to Remand, "solely upon the ground of newly-discovered evidence," as provided by the Rules of Practice and Procedure, etc., in Criminal Cases, the Circuit has the *discretionary* right to remand or to refuse to remand the case to the trial court to the end that the motion for new trial may be considered and ruled upon by the trial court.

2. In denying to petitioner, who had appealed from the judgment of the trial court, "within five (5) days after the entry of judgment of conviction," the right to move for a new trial and have that motion ruled by the trial court.

3. In holding that the Circuit Court and not the trial court should decide on the sufficiency of the affidavits and the probable effect on a new trial of the evidence set out in the affidavits appended to the motion for a new trial.

In passing upon the sufficiency of the affidavits submitted by the Petitioner in support of his motion to remand this cause to the trial court for its ruling upon a motion for a new trial the Circuit Court stated:

> "We have carefully reviewed all of the affidavits and find them to consist largely of hearsay statements and of impeachment of testimony received in the trial. We do not regard them as meeting the requirements, and particularly requirement (e) of Johnson v. United States, 32 Fed. (2d) 127 (C. C. A. 8)." (R., p. 147.)

Of course, in Johnson v. United States, the opinion, so far as the motion for a new trial was concerned, is primarily based upon the grounds as declared in that opinion:

> "First, the evidence was not *newly discovered;* and, second, the motion for a new trial does not disclose proper diligence. The first point alone, upon the facts in this case, is destructive of ap-

pellant's right to a new trial on the ground of newly discovered evidence."

We submit that "requirement (e) of Johnson v. United States" mentioned in the opinion of the Circuit Court, is not applicable, so far as the instant case is concerned.

We also respectfully urge that in the instant case, the affidavits submitted by the Petitioner in support of his request that his cause be remanded for ruling upon the motion for a new trial, demonstrate that the evidence which he will produce upon a new trial is newly discovered, and also, that the Petitioner has exercised proper diligence (see the affidavits on file of Ralph Wagner (R., p. 118), and Thomas Hunter, Frank E. Wellens, Theresa Pettinger and Luis A. Trias, Kimo Ward, Edith Hull, Lola E. Wagner, Jack Davis and William Cupples, referred to hereinafter).

The Notice of Appeal herein, is dated February 5, 1040, (R., p. 8) and was filed in duplicate with the clerk of the trial court on February 6, 1940. That clerk was by Rule IV of Criminal Practice and Procedure required to "immediately forward the duplicate Notice of Appeal to the clerk of the appellate court." That was done. From that time on, the circuit court had supervision and control of the proceedings. The jurisdiction of the trial court was lost, except as to its power to perfect and complete the record for appeal in aid of the circuit court's jurisdiction.

> "From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court

> shall, subject to these rules have supervision and control of the proceedings on the appeal. . . ." (Rule IV, Criminal Appeals Rules.)

Thereafter, so far as a new trial application is concerned,

> "the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment." (Rule II (3), Criminal Appeals Rules.)

It is apparent, therefore, that the Petitioner had done the only thing he could do after the appeal was perfected by applying to the Circuit Court for an order to remand this cause to the trial court for its ruling upon his motion for a new trial. He did that with diligence.

Granting for the moment, and for the purpose of argument only, that as held by the Circuit Court in its opinion, the affidavits submitted by the Petitioner "consist largely of hearsay statements and of impeachment of testimony received in the trial," we still urge that that did not justify the Circuit Court in refusing to remand.

Also the "requirement (e) of Johnson v. United States," quoted in the opinion of the Circuit Court, is not applicable here. Under the present rules of criminal practice and procedure, the Circuit Court need not and ought not consider the question as to whether or not "the newly discovered evidence would probably produce an acquittal." The appellate court need only

determine whether or not the matters set out in the affidavits in support of the motion to remand, justify the Appellate Court in remanding the case to the trial court. If the case is remanded, it is then up to the trial court to determine from the affidavits that may have been filed up to that moment whether or not a new trial should be granted. Those affidavits in support of the motion for a new trial may be and probably would be more persuasive in convincing the trial court that a new trial ought to be granted, than are the affidavits when considered by an Appellate Court.

This view is borne out by the changes that have been made in procedure on appeals, particularly as they have to do with application for a new trial. The present Rules of Practice and Procedure in criminal cases were promulgated by the Supreme Court, pursuant to an Act of Congress approved March 8, 1934. They became effective *after* the decision in Johnson v. United States, supra.

Under the old practice, if an appeal had already been taken, and the term of the trial court at which that decree, or judgment, was entered had not expired, and it was desired to reopen the cause for the taking of new evidence, the proper practice was to apply to the lower court to reopen the cause for the taking of new evidence, and in that case, to request the Appellate Court to remand the case. (O'Brien's Manual of Federal Appellate Procedure, 1929 ed., p. 39; also, Baltimore Co. v. Phillips (C. C. A. 2), 9 Fed. (2d) 903.)

Obviously, had that procedure been in force when this appeal was taken, and if within proper time the application had been made to remand the cause to the lower court, that lower court would consider on the motion for a new trial, whatever matters were then brought before it touching the motion for a new trial upon the ground of newly discovered evidence. It seems, therefore, that by the promulgation of the new rules which provide that the Appellate Court may remand the case to the trial court for its ruling upon the motion for a new trial, it was *not intended* to cut off the right of the appellant to have the trial court pass upon whatever information was then in its hands bearing upon the newly discovered evidence. In other words, the promulgation of the new rules ought not to circumscribe or cut down the right of the defendant to be heard on the motion for a new trial on any facts that would justify the trial court in granting a new trial on newly discovered evidence.

If, in support of his motion for a new trial before the lower court, the Petitioner was limited to the affidavits, then on file before the Circuit Court, there would be no reason whatever for the provision in the rules that the motion for a new trial shall be heard by the lower court when the case is remanded to that court by the Appellate Court. Surely, the Appellate Court would be equally competent to pass upon the sufficiency and merits of the affidavits then before it as would be the trial court. The very fact that the rules provide for the remanding of the case to the trial court

demonstrates that the trial court may consider whatever affidavits on newly discovered evidence that may be filed with that court in support of the motion for a new trial.

As to whether or not the affidavits now before this court "consist largely of hearsay statements and of impeachment of testimony received in the trial" we submit that such impeachment testimony would certainly have great bearing in the mind of the trial court as to whether or not those witnesses so impeached are worthy of belief. The impeaching testimony could hardly be held to be inadmissible hearsay if it goes to one of the very material points of the case; viz., the question as to whether or not the deductions in the Income Tax return were falsely and fraudulently claimed by the petitioner.

The language in the opinion of the Circuit Court, affirming the judgment of the District Court, clearly demonstrates the force of the point to which we now call this Honorable Court's attention. That opinion states:

> "We have no power to entertain a motion for a new trial; hence we consider only whether or not we should use our discretion to remand."

It later modified that sentence by stating:

> "We have no power to entertain a motion for a new trial, hence we consider only whether, in the exercise of our discretion, we should remand the case." (R. 152.)

A careful consideration of the rule referred to (Rule II, 2 (3), Criminal Practice and Procedure) demonstrates, that it is not a matter of discretion on the part of the Circuit Court as to whether or not it will remand the case to the lower court, *but one of duty.* That rule provides:

> "A motion for a new trial solely upon the ground of newly-discovered evidence may be made within sixty (60) days after *final judgment,* without regard to the expiration of the term at which judgment was rendered, *unless an appeal has been taken* and in that event the trial court may entertain the motion only on remand of the case by the appellate court for that purpose, and such remand may be made at any time before final judgment."

In the case of a defendant who has not appealed and who moves for a new trial solely upon the ground of newly discovered evidence before the trial court within the sixty (60) day period after final judgment, the trial court must consider and rule upon that motion.

A different situation, however, presents itself according to the rule in the event a defendant takes an appeal because, as the rule says, if "an appeal has been taken . . . the trial court may entertain the motion only on remand of the case oby the Appellate Court for that purpose."

In the case of a defendant who does not appeal the trial court must consider and pass upon the motion for a new trial made within sixty (60) days and made solely upon the ground of newly discovered evidence; in

the case of a defendant who does appeal, however, it would seem by the opinion filed in this case by the Circuit Court, that the defendant is denied his absolute right to compel the lower court to entertain and pass upon his motion for a new trial and must depend upon the good graces of the Appellate Court as to whether or not that court will remand the cause to the lower court to the end that the motion may be ruled.

The person who does not appeal may move for a new trial upon the discovery of new evidence at any time within sixty (60) days after the final judgment, and that trial court must hear the motion, but where he appeals he has no *right* to have the trial court pass upon the motion. He must await the determination by the Appellate Court as to whether or not that court will remand the case for a ruling on the motion. If the rule announced in the instant case were upheld, and if it is a matter of "discretion to remand," that which is a *right* in a defendant who does not appeal, in the hands of an appealing defendant becomes merely a *privilege,* which may be given or taken away in the "discretion" of the Appellate Court.

To illustrate. A man may be convicted and prosecute no appeal. Within sixty (60) days after judgment, he moves for a new trial upon newly discovered evidence which evidence we shall assume is most clear and convincing of his innocence. The trial court would be compelled to hear that motion for a new trial.

Now if the same man who under the same circumstances "within five (5) days after entry of judgment

of conviction" (Rule II (2), Criminal Practice and Procedure) the trial court would immediately lose jurisdiction, except to assist in the perfect and complete record for appeal, and under the present decision, the Appellate Court could use its own "discretion to remand"; although it is admitted that such Appellate Court has "no power to entertain a motion for a new trial." The exercise of the discretion against any remand is an *effective denial* of the motion.

Inasmuch as it is a right of persons convicted of crime who do not appeal from the judgment to use newly discovered evidence to effect a new trial, it certainly ought to be, and we think is a *right* of persons convicted of crime who do appeal, to use newly discovered evidence to obtain a new trial.

"That a new trial should ordinarily be granted because of newly discovered evidence" is elementary declared the court in Johnson v. United States, supra.

One other thought is worthy of consideration:

When and if the Appellate Court affirms a judgment, it becomes final unless an appeal is taken, and if the non-appealing defendant has a right to move for a new trial within sixty (60) days after the lower court's judgment is rendered, certainly the appealing defendant should have that same right after the case is back in the District Court from the affirming opinion of the Appellate Court. No action should be taken by an Appellate Court that would cut off or permit of the cutting off from an appealing defendant of any right which is accorded to a defendant who does not appeal.

POINT TWO

The Circuit Court first erred in holding that the newly discovered evidence should not be submitted to the trial court, and second, not allowing the trial court to decide whether the newly discovered evidence "shakes" the credibility of particular incriminating witnesses to a degree of affecting the decision of the trial court and probably affect the result of a new trial.

Petitioner submits that the newly discovered evidence set forth in the affidavits *does* discredit the particular witnesses, and a consideration of the testimony of each witness if discredited by the newly discovered evidence would, Petitioner submits, probably affect the result of a new trial.

1. Testimony of Charles W. Wagner.

(R., pp. 52 to 56):

Testified for the government to refute the deduction petitioner took from his income as a bad debt the amount of $1060.00 claimed by Petitioner to be owed him by Charles W. Wagner, his brother, by testifying that he (Charles W. Wagner) did not owe Petitioner any debt.

The affidavit of Edith Hull.

(R., pp. 123 to 125):

Shows that Charles W. Wagner owed her support and maintenance, by court order, for their infant son,

and told her the reason he could not pay the sums due was that he had borrowed money from Petitioner and that Petitioner had demanded payment, and therefore, he could not pay her until he had repaid Petitioner.

The affidavit of Kimo E. Ward.

(R., pp. 118 to 120):

Corroborates the fact alleged by Edith Hull, to-wit: that Charles W. Wagner did borrow money from Petitioner and did and does still owe Petitioner money.

The affidavit of Leo Ellis Wagner.

(R., pp. 120 to 121):

Corroborates the fact that Charles W. Wagner did and does owe Petitioner several thousand dollars.

2. The Testimony of Paul McPherson.

(R., pp. 40 to 44):

Called by the prosecution to refute the claim of Petitioner that he, among other things, paid $3500.00 to McPherson for a horse named Bert Abbey, and testified that Bert Abbey was purchased by Petitioner for $550.00.

The affidavit of Thomas Hunter.

(R., pp. 121 to 123):

Shows that Paul McPherson had told him he sold

Bert Abbey to Petitioner for $3500.00 and had paid $2500.00 for it from Roy Sherry.

The affidavit of Frank E. Wellens.

(R., pp. 125 to 126):

Shows the motive which caused Paul McPherson to falsify his testimony to the irreparable injury of Petitioner, in that Paul McPherson told Frank E. Wellens, "My testimony in the Wagner case was the cause of Wagner's conviction. If Ralph Wagner knew no more about his income tax for 1934 than he knew about horses, I am not surprised at his getting in trouble about his income tax. In 1934 I sold Wagner six or seven horses at an exorbitant cash price; and if I had testified in his case telling the price he paid me for the horses and the price for which I purchased them, I would have gotten into trouble for neglecting to pay my income tax on the several thousand dollars profit I made on my deals with Wagner in 1934."

3. The Testimony of Ernest Wagner.

(R., pp. 77 to 102):

In regard to the deduction claimed by Petitioner for a promissory note of $1808.00 for a debt owed him by Theresa Pettinger, and testified to by her son, Ernest Wagner, which was claimed by the prosecution to be false.

The affidavit of Theresa Pettinger.

(R., pp. 127 to 128):

Corroborates this testimonial fact that she does owe Petitioner $1808.00 and that she did sign the promissory note as evidence of this obligation.

4. The Testimony of Ben C. Axcley.

(R., pp. 56 to 65):

Regarding the execution of a fraudulent note by Charles W. Wagner to Petitioner as payee, and the attempt of Petitioner to age the note by putting it in his shoe, is discredited by

The affidavit of Luis A. Trias.

(R., pp. 128 to 129):

Which shows the malicious motive of Axcley to falsify his testimony against Petitioner, for reasons of envy, hate and revenge Axcley had toward Petitioner, to wit: his purposely advising Petitioner, as an attorney, about income tax law to get Petitioner into trouble, and his desire, by reason of Petitioner discharging him, to send Petitioner to prison.

5. The Testimony of Arlan Moore.

(R., pp. 19 to 32 and pp. 75 to 76):

Testified as the accountant who prepared Petitioner's income tax report and representing the "cost" fig-

ures as the "value" of Petitioner's assets, which misrepresented the true worth of Petitioner and was an erroneous factual statement in his return, for which Petitioner suffered conviction for a crime he had no intent to commit nor had knowledge of being committed.

The affidavit of Jack Davis—

(which is submitted for the first time):

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES)

Jack Davis, affiant, being first duly sworn deposes and says: that he is acquainted with Arlan Moore, the public accountant who was a witness in the case of United States versus Ralph W. Wagner; that he met Arlan Moore in the latter's office in the Equitable building, Los Angeles, California, on the 8th day of April, 1941, and conversed with him in the presence of William Cupples, Jr., regarding the trial and conviction of Ralph W. Wagner; that in said conversation Arlan Moore declared to affiant as follows: *"I got Wagner in bad with my testimony about those horses he bought in 1934, but I had to testify as I did to cover up a mistake I made when I prepared his income tax return. You see, when I prepared his tax return, I thought it was right to charge off depreciation of live stock on the basis of valuation; and I had Wagner give me his valuation of those horses, not the cost. Later I learned I should have charged*

off depreciation on the basis of cost, but it was too late then to do anything about it."

(Signed) Jack Davis also known as Jack Davis
Jack Davis, Affiant.

Subscribed and sworn to before me on this 9th day of April, 1941.

(Signed) Grace V. Smith
Notary Public in and for said County and State.
My Com. exp. Apr. 11, 1943.

The Affidavit of William Cupples, Jr.—

(which is submitted for the first time):

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS.
COUNTY OF LOS ANGELES)

William Cupples, Jr., affiant, being first duly sworn deposes and says: that he is acquainted with Arlan Moore, a public accountant, and was present in the office of the said Moore in the Equitable building, Los Angeles, California, on the 8th day of April, 1941, during a conversation between Arlan Moore and Jack "Diamondfield" Davis regarding the trial and conviction of Ralph W. Wagner in the United States District Court; that during said conversation this affiant heard Arlan Moore positively declare as follows: *"I got Wagner into trouble with my testimony about some horses he had bought, but I had to protect myself from a*

mistake I had made in preparing his income tax return. At the time I made out his income tax return I thought it right and proper to figure depreciation of live stock from the valuation of the stock; and I had Wagner give me his valuation of his horses and not the price he paid for them. Later I learned that I should have figured the depreciation from the cost of the horses, but it was too late then to correct my mistake."

(Signed) William Cupples Jr.
William Cupples, affiant.

Subscribed and sworn to
before me on this 9th
day of April, 1941.
(Signed) Grace V. Smith
Notary Public in and for
said County and State.
My Com. exp. Apr. 11, 1943.

Petitioner prays that when the aforestated newly discovered evidence discrediting the primary prosecution witnesses, is considered it throws in doubt all of said witnesses' testimony, and with the credibility of said primary witnesses' testimony impeached there is not sufficient evidence upon which a conviction can be sustained. There is sufficient doubt created as to the reliability of prosecution witnesses that if the trial court had not been erroneously prevented from considering this newly discovered material evidence, it probably would have granted a new trial. With this evidence properly introduced in defense of Petitioner, an acquittal probably would have been ordered.

In closing your Petitioner expresses his profound gratitude for the consideration this Honorable Court has given him. He is forced to draw this Petition in his own behalf, being bereft of funds to employ counsel, having expended all his worldly goods on the attorneys heretofore employed to seek and obtain justice for him.

He is on the mercy of this Honorable Court, praying for a chance to have the opportunity in a new trial to defend himself by the introduction of the aforestated new material and substantial evidence which through the adversity of fate was not discovered at the time of his trial.

RALPH W. WAGNER,
Appearing in His Own Behalf.